Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1994

Ms. Detra G. Hill
Assistant City Attorney
Supervisor, Criminal Law and Police Division
City of Dallas
501 Police & Courts Building
Dallas, Texas 75201

OR94-771

Dear Ms. Hill:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 28400.

The City of Dallas (the "city") has received a request for the names of certain police department officers and administrators who are discussed but not identified in a report on the department's hiring and training, as well as certain other information related to the report. The city asserts that the information is excepted from required public disclosure under section 552.101 of the Government Code.[1]

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977):

> information ... is excepted from mandatory disclosure ... as information deemed confidential by law if (1) the information

[1]We are somewhat puzzled by the inclusion of attachments D and K, which you inform us have not been requested. We neither consider whether they may be excepted from required public disclosure nor comment on whether they are responsive to the request.

> contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered the information relating to the following topics to be intimate and embarrassing: sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Attachments A and E reveal the identity of a police department applicant who admitted touching his tongue with cocaine. The city contends that disclosure of his identity would violate his common-law privacy rights "since there is no conclusive evidence as to whether he committed the act." The city argues that this information is intimate and embarrassing and is not of legitimate public interest because there was no conclusive determination. We disagree. First, the qualifications of applicants for public employment are of legitimate public interest. *See* Open Records Decision No. 455 (1987). Second, the truth or falsity of information is irrelevant to our consideration of whether it is excepted from disclosure under the doctrine of common-law privacy. *See* Open Records Decision No. 579 at 3-8 (1990); *see also Cain v. Hearst Corporation*, 878 S.W.2d 577 (Tex. 1994) (holding that Texas does not recognize the tort of false light invasion of privacy).

Attachment B reveals the identity of a police department applicant who was granted an exception from hiring requirements. The city asserts that this information is confidential under chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code makes confidential "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." Section 611.004 prohibits a person who receives information from confidential communications or records from further disclosing such information "except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information." Health & Safety Code § 611.004(d). Attachment B, part of the report prepared by the department, merely states that the applicant was rejected for employment because he failed a psychological examination. The record (i) does not reveal communications between the applicant and the examining professional; (ii) is not a record created or maintained by the professional; and (iii) does not further disclose confidential communications or records. Therefore, sections 611.002 and 611.004 are inapplicable. Furthermore, because the record does not reveal the reasons the applicant failed the examination or any other details about the examination, we do not believe that this information is highly intimate or embarrassing. Because it pertains to the qualifications of an applicant for public employment, it is of legitimate public interest. Therefore, attachment B is not protected by common-law privacy.

Attachments C, E and L reveal the identity of a senior corporal who allegedly sexually harassed a recruit and other details about the allegations. The city contends that the release of this information would violate the senior corporal's common-law privacy rights because "no actual sexual harassment was determined and disclosure of this information could place the officer in a false light." As noted above, the truth or falsity of information is irrelevant to our consideration of whether it is excepted from disclosure under the doctrine of common-law privacy. *See* Open Records Decision No. 579 at 3-8 (expressly concluding that the Open Records Act does not protect information because its release would place a person in a false light); *see also Cain*, 878 S.W.2d 577. We further note that while the doctrine of common-law privacy may, in some instances, protect the identity of the alleged victim of sexual harassment, *see Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), it has not been held to protect the identity of an alleged perpetrator.

While it seeks to withhold the identity of the senior corporal, the city has failed to assert that the identities of the alleged victim and witnesses are confidential. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment involving intimate and embarrassing sexual conduct. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment were exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* at 525.

Attachments C, E, and L reveal the identities of the alleged victim and witnesses as well as some of the details of the alleged harassment. They do not reveal the substance of the alleged victim's allegations, however. Therefore, we are unable to determine whether the allegations involve intimate and embarrassing sexual conduct. If the allegations involve conduct of an intimate and embarrassing nature, the identities of the alleged victim and the witnesses are confidential under *Ellen*.

Attachment F lists officers by badge number and contains columns of information, including columns labeled "psychological review" and "medical review." In both columns, there is a "y" by each officer's badge number. Apparently, a "y" indicates that the officer underwent and/or passed the review. The city contends that Attachment F is confidential under chapter 611 of the Health and Safety Code and article 4495b, V.T.C.S. Much like section 611.002 of the Health and Safety Code, section 5.08 of article 4495b makes confidential communications between patients and their physicians and records regarding the treatment of a patient created or maintained by a physician, and prohibits the further release of information received from such confidential communications and records. Attachment F does not reveal communications between mental health professionals or physicians and their patients nor is it a record created or maintained by a mental health professional or physician. Furthermore, it does not further

disclose information received from such communications or records. Therefore, neither statute applies. In addition, we note that the fact that an officer has undergone and/or passed such reviews is of legitimate public interest and therefore not protected under the doctrine of common-law privacy.

Attachment G appears to be the file relating to the application of the individual at issue in Attachment A. The city merely reasserts its arguments with respect to Attachment A. As noted above, the identity of the individual is not protected from disclosure. Other information in the file, however, may be protected.

First, the file contains the applicant's home address. The home address of an applicant generally is not confidential, Open Records Decision No. 455 at 7, but section 552.117(1)(B) of the Government Code makes confidential the home address of a "peace officer." The home address of the applicant is confidential only if he is a "peace officer" as defined by section 552.117(1)(B). Second, the material contains criminal history information. This information is protected under common-law privacy. Open Records Decision No. 215 (1978). Third, the material appears to reveal information relating to a polygraph examination. Section 19A of article 4413(29cc) provides that a governmental agency that requests a polygraph examination must keep confidential information it acquires from the polygraph examination. This provision requires the city to keep confidential any information it acquired from the polygraph examination. Finally, the material reveals information regarding the applicant's prior drug use. Because this information relates to the applicant's qualifications for employment and does not appear to reveal highly intimate or embarrassing medical information, it is not protected from disclosure under the doctrine of common-law privacy.

Attachment H reveals that a particular applicant passed psychological and medical evaluations, and that he underwent a polygraph test and a "psychologist review." The mere fact that the applicant underwent and/or passed psychological and medical evaluations and a "psychologist review" is not confidential under statute or the doctrine of common-law privacy. Nor is the mere fact that the applicant took a polygraph test protected under article 4413(29cc).

Attachments I and J reveal that particular professionals found an applicant to be psychologically suitable or unsuitable. In addition, these attachments refer to a professional's substantive comments. The fact that the applicant was found to be psychologically suitable or unsuitable does not reveal communications between the applicant and the examining professional and is not a record created or maintained by the professional nor does it further disclose information received from such communications or records. We conclude, however, that allusions to a professional's substantive comments reveal information received from confidential records. This information, which we have marked, may not be released "except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information." Health & Safety Code § 611.004.

With the exceptions noted above, the information must be released. If you have questions about this ruling, please contact our office.

Yours very truly,

Mary R. Crouter

Mary R. Crouter
Assistant Attorney General
Open Government Section

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Ref.: ID# 28400

Enclosures: Marked documents

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